

**VIRGINIA DEPARTMENT OF PLANNING AND BUDGET
ECONOMIC AND REGULATORY ANALYSIS DIVISION**

PUBLIC PARTICIPATION GUIDELINES

GUIDANCE DOCUMENT 2008-1

Introduction:

This document is designed to provide guidance to rulemaking entities and agency staff as they adopt public participation guidelines pursuant to [SB 734/HB 1167](#) enacted by the 2008 General Assembly.

Summary:

Public participation guidelines exist to promote public involvement in the development, amendment, or repeal of state regulations. Under [Virginia Code § 2.2-4007.02](#), every rulemaking body in Virginia is required to adopt public participation guidelines and to use these guidelines in the development of its regulations. This law was modified during the 2008 General Assembly session: when the amendments take effect on July 1, 2008, agencies will have until December 1, 2008 to either adopt the model public participation guidelines issued by DPB, or, if they need to make significant changes to the guidelines, to file a fast-track regulatory action with DPB by that time.

Since the legislative intent is to standardize the public participation process so that interested members of the public know how and when to comment and/or participate in various topics of interest, agencies are urged to carefully consider whether any modifications to the model guidelines are appropriate. Please be advised that DPB will be examining each proposed modification to determine whether they conform to the stated goal of promoting uniformity and consistency among state agencies. Agencies are cautioned not to make minor changes merely for the sake of customization. Agencies with multiple boards are permitted to adopt the model guidelines for one or more boards and modify the guidelines for one or more boards if each board has unique public participation needs.

Note that under [Virginia Code § 2.2-4004](#), regulations adopted pursuant to the Administrative Process Act are severable. DPB interprets this provision to mean that the public participation guidelines are severable as well.

Definitions:

As used in this document, the following terms have the following meanings:

Agency: agency, board, department, or commission that makes regulations or decides cases.

Agency's revised PPGs: the revised public participation guidelines submitted by an agency via the fast-track process. Please note that agencies who wish to submit their own guidelines must use the model guidelines as the starting point.

APA: [Virginia Administrative Process Act](#).

DPB: [Virginia Department of Planning and Budget](#).

ERAD: [Economic and Regulatory Analysis Division](#) of the Department of Planning and Budget.

FOIA: [Virginia Freedom of Information Act](#).

PPGs: Public Participation Guidelines.

Model PPGs: the model PPGs furnished by DPB in accordance with SB 734/HB 1167.

Timeline:

July 1, 2008: On or before this date, DPB will provide the model PPGs to all agencies.

December 1, 2008: On or before this date, all agencies will do one of the following:

- Adopt the model PPGs as an exempt action while simultaneously repealing the current PPGs; OR
- Submit the agency's revised PPGs as a fast-track regulation to DPB while simultaneously repealing the current PPGs.

January 1, 2009:

Any NOIRA, fast-track, or emergency regulation submitted on or after this date must be promulgated in accordance with the new PPGs (either model or the agency's revised). A proposed stage which is submitted to DPB after this date shall be promulgated in accordance with the PPGs that were in existence at the time that the original NOIRA or emergency stage was submitted to DPB for review.

Note I: Each executive-branch agency will need to take this action for each board that falls under its purview. DPB will provide each agency with a list of its boards.

Note II: Please be mindful of timeframe issues: any revised PPG fast-track regulations will need to be reviewed as usual by DPB, the appropriate Secretary's Office, and the Governor's Office. On a related note, please be mindful of workload issues. In addition to the executive branch review team, the promulgation of revised fast-track regulations will also result in increased workloads for agency regulatory coordinators and the Registrar's Office.

Note III: If the agency plans to submit a revised PPG as a fast-track regulation, please remember that by January 1, 2009, the modified PPG will need to have COMPLETED

executive branch review, be published in the *Virginia Register*, and have taken effect. Merely having been submitted to DPB or having completed DPB review will be insufficient. An agency that does not have newly adopted PPGs in place by this date (either model exempt or revised fast-track) will be unable to initiate any new regulatory actions until the new PPGs are effective.

Chapter

Each agency will need to insert the appropriate chapter number for the public participation guidelines. Merely making this change and the changes discussed below in § 10, Purpose, and § 20, Definitions, would still qualify the action as exempt.

§ 10, Purpose

Each agency will need to insert the name of the appropriate agency, board, department, or commission. Merely making this change, along with the insertion of the Chapter number, discussed above, and the related change in § 20, Definitions, discussed below, would still qualify the action as exempt.

§ 20, Definitions

Agency: Each agency will need to insert the name of the appropriate agency, board, department, or commission. Merely making this change, along with the insertion of the Chapter number and the related change in § 10, Purpose, discussed above, would still qualify the action as exempt.

Agencies should be aware that the definition of “agency” in the model PPGs was taken from [Virginia Code § 2.2-4001](#) and modified to encompass the “largest” rule-making entity for a particular subject area. Not all “agencies” in the traditional sense of the definition, have boards, and among boards, powers and duties vary considerably. Thus, the decision was made, in consultation with the Registrar’s Office, to use the definition of “agency” found in the APA.

Negotiated rulemaking panel or NRP: NRPs are designed to be used in situations where an agency expects a great deal of controversy and/or there are a significant number of stakeholders. Situations that would involve a NRP are usually those that could be costly and for which consensus cannot be achieved without a facilitator. The facilitator can be any qualified individual of the agency’s choosing so long as the agency has the necessary legal authority and financial resources to hire the person.

Open meeting: An open meeting is a “meeting” in the traditional sense of the word under the APA; i.e. those that are subject to FOIA and must be posted on the Town Hall/Commonwealth Calendar. It does not include a group of state employees discussing a program or proposed regulatory action.

Regulatory advisory panel or RAP: RAPs are designed to be used in situations where a regulation is fairly complex or would affect numerous stakeholders. RAPs tend to be technical

in nature, such as cases in which subject-matter experts are used to “flesh out” the regulation in its development stages.

§ 30, Notification list

Part D and E: Note that one undeliverable email is insufficient grounds for an agency to delete a person who has indicated they wish to be on the notification list. The same standard applies for a single instance of undeliverable mail to an individual who elects to receive information through a postal carrier. Please note that it is DPB’s practice to discontinue automatic notifications to Town Hall users only after three consecutive emails are returned as undeliverable.

Agencies may track returned mail and returned emails by any process that best suits their business practices. Agencies are encouraged to considering using alternative methods of contacting individuals in cases where email notifications have been returned as undeliverable. For example, if the individual has provided a name and physical mailing address to the agency, the agency may elect to contact the individual via postal carrier and inquire as to whether they are still interested in receiving regulatory information.

In addition to the categories of individuals listed in the PPGs, the agency may, in its discretion, add to its notification list any person the agency believes might be interested in participating in the promulgation of regulations.

§ 50, Public comment

Part C: In determining whether a comment period should be extended, agencies may consider two scenarios.

Example 1: If an agency receives comments after the comment period has closed, the agency may elect to extend the comment period. Note that agencies are not required to extend the timeframe, nor are they required to accept comments submitted after the comment period has ended. However, the agency may decide that in the interests of honoring public participation, it will accept late comment. Agencies should balance openness and accessibility with the danger of setting precedents so their constituents do not automatically expect comment periods to be extended.

To prevent this, an agency may elect to extend the comment period if, for example, a certain number of comments are received, or if the comments are received within a certain number of days after the close of the comment period. Any agency which elects to extend the public comment period must do so publicly by following the provisions of the APA. An agency cannot merely elect to accept late comments without giving other would-be late commenters a similar opportunity to participate in the regulatory process.

Example 2: An agency can choose to extend a comment period if a regulation that it initially believed would be non-controversial turns out to be contentious. In this instance, an agency may also elect to extend the comment period. Once again, agencies are not

obligated to extend the comment period, but may elect to do so in the interest of open government and increasing public participation in the regulatory process.

§ 60, Petition for rulemaking

Agencies are encouraged to work with their constituents to respond to petitions for rulemaking. Upon receipt of a petition, agencies may request additional information from the petitioner, including but not limited to: additional contact information (such as an email address), the organization or interests represented by the petition, and any recommended additions, deletions, or amendments to the regulation.

§ 70, Appointment of regulatory advisory panel

A RAP is designed to function similar to a technical advisory committee: that is, it is appropriate in a situation involving a complex regulation or in a case where an agency wishes to consult with subject matter experts representing various stakeholder interests. A RAP is typically used in the developmental stage of a regulation.

If an agency elects to use a RAP to develop a regulation, membership must be balanced between various constituencies; for example, citizen groups, representatives of both large and small stakeholders, and related governmental entities.

RAP meetings must be posted on TownHall/the Commonwealth Calendar in accordance with the APA, FOIA, and any other requirements mandated by an agency's basic law.

The appointment of a RAP does not preclude an agency from later using a NRP if the agency deems it to become necessary. Prior to the appointment of a RAP, an agency may also consult with groups or individuals who have demonstrated an interest in working with the agency.

§ 80, Appointment of negotiated rulemaking panel

A NRP is designed to be used primarily for lengthy and/or complex regulations with many competing constituencies, and often, substantial costs and other compliance requirements. A NRP can be used in order to help agencies reach a compromise.

If an agency elects to use a NRP to resolve any outstanding issues, membership should be balanced among various constituencies: for example, citizen groups, representatives of both large and small stakeholders, and related governmental entities.

If a facilitator is elected or appointed to lead the NRP, the agency shall strive to obtain a qualified individual who is not a member of any of the competing interest groups. Further, it is best practice for the mediator/facilitator to be agreed to by all parties.

NRP meetings must be posted on TownHall/the Commonwealth Calendar in accordance with the APA, FOIA, and any other requirements mandated by an agency's basic law.

An agency may appoint a NRP whether it has previously used a RAP, informally consulted with groups or individuals in the development of the regulation, neither, or both.

§ 90, Meetings

As a general rule, FOIA requires all meetings of public bodies to be open and that notice of public meetings must be provided at least three working days prior to the meeting. This section requires notice of meetings relating to the promulgation, amendment or repeal of regulations to be posted at least seven working days in advance. The Model PPG has set a seven day standard due to notification lists and other mailing requirements. This will allow time for those individuals who receive their information via postal carrier to receive information before the actual meeting date. This requirement also ensures that agencies will be able to comply with the language in Executive Order 26 (2006) which states that “wherever feasible, agencies shall post the agenda for a public meeting on the Virginia Regulatory Town Hall at least seven days prior to the date of the meeting.” Town Hall requires that an agency must post a meeting notice before it can post an agenda for that particular meeting.

An exception has been created for special or emergency meetings that meet the requirements of [Virginia Code § 2.2-3707](#). In these situations, agencies are required to post the notice of any such special or emergency meetings at the same time the agency notifies the meeting participants that a meeting will be held.

In addition, wherever practicable, meetings held during the comment period should occur no less than 15 days prior to the close of the comment period. All meetings should be held in locations that facilitate public participation.

§ 100, Public hearings on regulations

This section requires notice of public hearings to be posted at least seven working days in advance. This will allow time for interested parties to receive all of the necessary information prior to the hearing date.

In addition, wherever practicable, public hearings held during the comment period should occur no less than 15 days prior to the close of the comment period. All public hearings should be held in locations that facilitate public participation.

Transition

Agencies should adhere to the following guidelines over the next several months and years as they begin to promulgate their PPGs and any regulatory actions initiated after the key dates listed in SB 734/HB 1167.

All regulatory actions for which a NOIRA or an Emergency/NOIRA has been published in the *Virginia Register* prior to January 1, 2009 shall be processed in accordance with the agency’s PPGs that were in effect on the date the action was submitted to DPB for executive branch review.

All regulatory actions in the NOIRA, Emergency/NOIRA, or fast-track stages submitted to DPB on or after January 1, 2009 will be processed in accordance with the agency's newly adopted model PPGs, provided that the model PPGs are in effect as of the date the regulatory action was submitted.

APPENDIX A

CHAPTER [REDACTED]

PUBLIC PARTICIPATION GUIDELINES

Part I

Purpose and Definitions

__VAC__ - __-10. Purpose.

The purpose of this chapter is to promote public involvement in the development, amendment or repeal of the regulations of the [Insert name of your Board/Department/Commission]. This chapter does not apply to regulations, guidelines, or other documents exempted or excluded from the provisions of the Administrative Process Act (§2.2-4000 et seq. of the Code of Virginia).

__VAC__ - __-20. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Administrative Process Act" means Chapter 40 (§2.2-4000 et seq.) of Title 2.2 of the Code of Virginia.

"Agency" means the [Insert the name of your Board/Department/Commission], which is the unit of state government empowered by the agency's basic law to make regulations or decide cases. Actions specified in this chapter may be fulfilled by state employees as delegated by the agency.

"Basic law" means provisions in the Code of Virginia that delineate the basic authority and responsibilities of an agency.

"Commonwealth Calendar" means the electronic calendar for official government meetings open to the public as required by §2.2-3707 C of the Freedom of Information Act.

"Negotiated rulemaking panel" or "NRP" means an ad hoc advisory panel of interested parties established by an agency to consider issues that are controversial with the assistance of a facilitator or mediator, for the purpose of reaching a consensus in the development of a proposed regulatory action.

"Notification list" means a list used to notify persons pursuant to this chapter. Such a list may include an electronic list maintained through the Virginia Regulatory Town Hall or other list maintained by the agency.

"Open meeting" means any scheduled gathering of a unit of state government empowered by an agency's basic law to make regulations or decide cases, which is related to promulgating, amending or repealing a regulation.

"Person" means any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

"Public hearing" means a scheduled time at which members or staff of the agency will meet for the purpose of receiving public comment on a regulatory action.

"Regulation" means any statement of general application having the force of law, affecting the rights or conduct of any person, adopted by the agency in accordance with the authority conferred on it by applicable laws.

"Regulatory action" means the promulgation, amendment, or repeal of a regulation by the agency.

"Regulatory advisory panel" or "RAP" means a standing or ad hoc advisory panel of interested parties established by the agency for the purpose of assisting in regulatory actions.

"Town Hall" means the Virginia Regulatory Town Hall, the website operated by the Virginia Department of Planning and Budget at www.townhall.virginia.gov that has online public comment forums and displays information about regulatory meetings and regulatory actions under consideration in Virginia and sends this information to registered public users.

"Virginia Register" means the Virginia Register of Regulations, the publication that provides official legal notice of new, amended and repealed regulations of state agencies, which is published under the provisions of Article 6 (§2.2-4031 et seq.) of the Administrative Process Act.

Part II

Notification of Interested Persons

VAC - -30. Notification list.

- A. The agency shall maintain a list of persons who have requested to be notified of regulatory actions being pursued by the agency.
- B. Any person may request to be placed on a notification list by registering as a public user on the Town Hall or by making a request to the agency. Any person who requests to be placed on a notification list shall elect to be notified either by electronic means or through a postal carrier.
- C. The agency may maintain additional lists for persons who have requested to be informed of specific regulatory issues, proposals, or actions.
- D. When electronic mail is returned as undeliverable on multiple occasions at least 24 hours apart, that person may be deleted from the list. A single undeliverable message is insufficient cause to delete the person from the list.
- E. When mail delivered by a postal carrier is returned as undeliverable on multiple occasions, that person may be deleted from the list.

F. The agency may periodically request those persons on the notification list to indicate their desire to either continue to be notified electronically, receive documents through a postal carrier, or be deleted from the list.

__VAC__ - __-40. Information to be sent to persons on the notification list.

A. To persons electing to receive electronic notification or notification through a postal carrier as described in __VAC__ - __-30, the agency shall send the following information:

1. A notice of intended regulatory action (NOIRA).
2. A notice of the comment period on a proposed or a repropoed regulation and hyperlinks to, or instructions on how to obtain, a copy of the regulation and any supporting documents.
3. A notice soliciting comment on a final regulation when the regulatory process has been extended pursuant to §2.2-4007.06 or 2.2-4013 C of the Code of Virginia.

B. The failure of any person to receive any notice or copies of any documents shall not affect the validity of any regulation or regulatory action.

Part III

Public Participation Procedures

__VAC__ - __-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues, the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.
2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).
2. For a minimum of 60 calendar days following the publication of a proposed regulation.
3. For a minimum of 30 calendar days following the publication of a repropoed regulation.
4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.
6. For a minimum of 21 calendar days following the publication of a notice of periodic review.
7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with §2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to §2.2-4012 E of the Code of Virginia.

___VAC___ - ___-60. Petition for rulemaking.

A. As provided in §2.2-4007 of the Code of Virginia, any person may petition the agency to consider a regulatory action.

B. A petition shall include but is not limited to the following information:

1. The petitioner's name and contact information;
2. The substance and purpose of the rulemaking that is requested, including reference to any applicable Virginia Administrative Code sections; and
3. Reference to the legal authority of the agency to take the action requested.

C. The agency shall receive, consider and respond to a petition pursuant to §2.2-4007 and shall have the sole authority to dispose of the petition.

D. The petition shall be posted on the Town Hall and published in the Virginia Register.

E. Nothing in this chapter shall prohibit the agency from receiving information or from proceeding on its own motion for rulemaking.

___VAC___ -70. Appointment of regulatory advisory panel.

A. The agency may appoint a regulatory advisory panel (RAP) to provide professional specialization or technical assistance when the agency determines that such expertise is necessary to address a specific regulatory issue or action or when individuals indicate an interest in working with the agency on a specific regulatory issue or action.

B. Any person may request the appointment of a RAP and request to participate in its activities. The agency shall determine when a RAP shall be appointed and the composition of the RAP.

C. A RAP may be dissolved by the agency if:

1. The proposed text of the regulation is posted on the Town Hall, published in the Virginia Register, or such other time as the agency determines is appropriate; or
2. The agency determines that the regulatory action is either exempt or excluded from the requirements of the Administrative Process Act.

___VAC___-80. Appointment of negotiated rulemaking panel.

A. The agency may appoint a negotiated rulemaking panel (NRP) if a regulatory action is expected to be controversial.

B. A NRP that has been appointed by the agency may be dissolved by the agency when:

1. There is no longer controversy associated with the development of the regulation;
2. The agency determines that the regulatory action is either exempt or excluded from the requirements of the Administrative Process Act; or
3. The agency determines that resolution of a controversy is unlikely.

___VAC___-___-90. Meetings.

Notice of any open meeting, including meetings of a RAP or NRP, shall be posted on the Virginia Regulatory Town Hall and Commonwealth Calendar at least seven working days prior to the date of the meeting. The exception to this requirement is any meeting held in accordance with §2.2-3707 D of the Code of Virginia allowing for contemporaneous notice to be provided to participants and the public.

___VAC___-___-100. Public hearings on regulations.

A. The agency shall indicate in its notice of intended regulatory action whether it plans to hold a public hearing following the publication of the proposed stage of the regulatory action.

B. The agency may conduct one or more public hearings during the comment period following the publication of a proposed regulatory action.

C. An agency is required to hold a public hearing following the publication of the proposed regulatory action when:

1. The agency's basic law requires the agency to hold a public hearing;
2. The Governor directs the agency to hold a public hearing; or
3. The agency receives requests for a public hearing from at least 25 persons during the public comment period following the publication of the notice of intended regulatory action.

D. Notice of any public hearing shall be posted on the Town Hall and Commonwealth Calendar at least seven working days prior to the date of the hearing. The agency shall also notify those persons who requested a hearing under ___VAC___-100.C.3.

__VAC__ - __-110. Periodic review of regulations.

A. The agency shall conduct a periodic review of its regulations consistent with:

1. An executive order issued by the Governor pursuant to §2.2-4017 of the Administrative Process Act to receive comment on all existing regulations as to their effectiveness, efficiency, necessity, clarity, and cost of compliance; and
2. The requirements in §2.2-4007.1 of the Administrative Process Act regarding regulatory flexibility for small businesses.

B. A periodic review may be conducted separately or in conjunction with other regulatory actions.

C. Notice of a periodic review shall be posted on the Town Hall and published in the Virginia Register.